No. 2029

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC LIVE STOCK COMPANY
(A Corporation)
APPELLANT

vs.

THE SILVIES RIVER IRRIGATION COMPANY
(A Corporation)
and HARNEY VALLEY IMPROVEMENT COMPANY
(A Corporation)
APPELLEES

Brief on Behalf of the Appellees

APPEAL FROM THE DECISION OF THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON
HON. ROBT. S. BEAN, JUDGE

WILLIAMS, WOOD & LINTHICUM,
and LIONEL WEBSTER,
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THE PACIFIC LIVE STOCK COMPANY
(a Corporation),
Appellant,

v.

THE SILVIES RIVER IRRIGATION COMPANY (a Corporation) and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),
Appellees.

Brief on Behalf of the Appellants

STATEMENT OF THE CASE

This is an equity cause, appellant seeking relief by injunction against the respondent, Silvies River Irrigation Company, an Oregon corporation, which as successor to the Harney Valley Improvement Co. had commenced the construction of a canal intended to divert the flood waters of Silvies River at a point near where that river enters Harney Valley, Oregon, at the north end thereof. Harney Valley is the bed of an extinct lake or inland sea, about seventy-five miles in length and forty miles in width, covered with sagebrush for the most part, and though appar-

ently level as a floor to the eye, yet sloping with a very slight grade toward the south and east. Silvies River rises at the north, in the Blue Mountains, and has a vast watershed, and flows nearly the entire length of the valley toward the south, and there in conjunction with the Blitzen River (which flows from Stein Mountain at the south to the north), forms Malheur and Harney Lakes; the two lakes being properly one body of water, connected by a neck called the Narrows. It is important to respondent's contentions to understand that these large lakes are formed by these two rivers, the Blitzen flowing from the south northward and the Silvies from the north southward, and that the Silvies River is the longer and larger of the two. It is agreed by both parties that in the spring of the year, with the melting of the mountain snow and the coming of the spring rains, Silvies River is greatly swollen in volume, and a large portion of this flat valley adjacent to the river is inundated. There is a still larger portion, however, which is slightly higher than that immediately adjacent to the river. This is barren sagebrush land and is commonly called, colloquially, and is alluded to in the evidence as "the desert." The dispute in this case is the right of the appellee, The Silvies River Irrigation Co., to appropriate these flood waters, or any part of them. This appellee freely admits that all of the ordinary summer flow of the river is already appropriated, and the entire purpose of its incorporation and activities is to take the surplus flood water which, as it contends, goes to waste and forms, or helps to form, these lakes and a vast area of swamp, and lead it out upon this desert sagebrush land, where sufficient wetting can be got from the flood waters to make a

good crop of grass or alfalfa, or of cereals. The appellant, on the other hand, claims that the entire flood water is the very thing which it depends upon to make its hay crop on its grass meadows, and that it needs the whole of the flood and during the whole period of the flood. The appellee, in turn, retorts that appellant does not need the entire flood, but that the full volume of the river within its banks would be quite sufficient for its purposes of irrigation, especially were the water properly used, and that the flood water which goes out of the banks and spreads over the country ought to be allowed to the appellee for its reclamation of the desert lands; and the appellee alleges that the appellant does not use the water scientifically, but that it comes down and overflows the natural grass meadows, wastefully and practically just as it used to from time immemorial, putting an unnecessary depth of water on the meadows, as much as one foot to three feet in depth, which is beyond all needs of irrigation; and having thus naturally flooded these low lands, the great excess makes the swamps which border Malheur Lake, and the evidence shows that about one-third of appellant's lands described in the bill is swamp. The court below apparently did not come to the conclusion that appellant had sustained its contention that all the flood water was needed for its own particular private holdings, but the court seems to have reached the conclusion, not strictly warranted by the issues, that all of the private holdings along the river, including the complainant's, with others not parties, needed the flood waters, so far as the evidence tended to disclose the facts, but that this evidence was not sufficiently full and satisfactory. At

page 29 of the transcript of record, the court says in its opinion:

"The defendants claim the right to take the surplus water only, and disclaim any intention of interfering with any of the rights of the settlers. But it is not shown that there is any surplus water. Indeed, the evidence in this case tends strongly to support the complainant's position that all the water is necessary for the irrigation of the land in private holdings and which is annually irrigated by the overflow, if undisturbed. Until it is adjudicated in some appropriate proceeding that there is a surplus of water and the quality (sic) thereof. I do not think the defendant should be permitted to interfere with the natural flow, and thus invite numerous conflicts and controversies between it and the settlers."

The court added from the bench orally, by way of explanation, that Oregon had adopted a water code and had appointed a Water Board authorized to take up all contests and bring before it all claimants from the head to the mouth of the stream, and upon proper evidence duly recorded to adjust the various claims, subject to final appeal to the courts; and he did not think in this suit between two private parties upon the evidence before the court, this important matter should be prejudged and the efforts of the Water Board toward a general adjustment be impeded.

Carrying out this idea the court, in its opinion, page 30 of the transcript, ordered that the decree be entered with a provision at the foot thereof, reserving the right to these appellees to apply for a vacation of the injunction if it should hereafter be determined in an appropriate proceeding that there is any surplus water subject to appropriation by it. The decree, following this intimation, pro-

vides, page 37 of the transcript: "It is further considered, ordered, adjudged and decreed that there be reserved to the defendants above named, and each of them, the right to apply to this court at any time hereafter for a vacation of the injunction if it should be hereafter determined in some appropriate proceeding that there is any surplus water subject to appropriation by them, or by any or either of them." It is from this portion of the decree that appellants have brought their appeal to this court.

The appellees have moved to dismiss the appeal and at the foot of this brief renew said motion on the ground that the portion of the decree appealed from is discretionary with the court below, and therefore neither creates nor denies any appealable right. The appellees in the alternative also move against a diminution of the record and show that the entire testimony in the case (save as will be hereafter noted) and all the exhibits remain in the court below and no transcript thereof has been brought to this court, and appellees will argue that either the appeal be dismissed or that the full record be ordered into this court so that this court may proceed as in a trial *de novo*, otherwise gross injustice will be done these appellees.

The appellees also show to this court that there is a stipulation on file in this cause (No. 2029) permitting either party to use in this cause the testimony taken in the cause by this appellant against William Hanley *et al.*, also before this court (No. 2036), and the appellees contend that this stipulation follows the cause in all its proceedings and if this court should take jurisdiction of the appeal and deny the motion to complete the record, still there is a record before it upon the facts in this case (the trans-

cript in cause No. 2036), which though but a partial record and a very inconsiderable part of the testimony pertinent to this case, yet of itself shows that the decree of the court below should be modified to the extent of dissolving the injunction and permitting the appellee, the Silvies River Irrigation Company, to proceed with its important and beneficial public enterprise.

The appellees desire this court to clearly understand, however, that they do not consent to any such hearing upon so incomplete a record, and have only discussed the record before the court out of abundance of caution.

The appellees feel that the real record, made with especial view to the issues in this case (over 600 pages typewritten testimony and all the maps, plats, etc.), are not before the court and it would be very unjust to try the cause upon so mutilated a record. But if appellees can give this court jurisdiction by consent, and if this court is willing to make a precedent by hearing an appeal on a discretionary matter, then appellees will be glad to have the cause heard *de novo,* but only upon a full and complete record.

With this statement appellees submit the following

POINTS AND AUTHORITIES

I.

The part of the decree appealed from lay within the discretion of the court, and is not appealable.

McMicken v. Perin, 18 How. (59 U. S.) 507 (citation page 511).

Wyle v. Coxe, 14 How. 1.

Steines v. Franklin County, 14 Wall. 15 (citation page 22).
Terry v. Commercial Bank, 92 U. S. 454.
Marine Insurance Co. v. Hodgson, 6 Cranch 206 (citation page 217).
McLeod v. City of New Albany, 66 Fed. Rep. 378.
Barr v. Gratz, 4 Wheat. 213 (citation page 220).
And see Brockett v. Brockett, 2 How. 238 (citation page 24).
And see 2 Daniell's Chancery Practice, 4th Ed. 1462-1463.
Street's Fed. Equity Practice, 2083.
Am. Enc. Pleading and Practice, 2, page 92.

II.

It lies within the discretion of the chancellor to give to either party leave to move against the decree in the future and to reserve to himself the right to open the decree for further consideration by an entry at the foot of the decree saving this right.

Le Grand v. Whitehead, 1 Russell 309.
Daniell's Chancery, 996.
Foster's Federal Practice, page 671.

III.

The appellants, by appealing from only this portion of the decree, consent to the balance of the decree.

2nd Daniell's Chancery (4th Edition), page 1467.
Parker v. Morrell, 2 Phillips 453.
Rawlins v. Powell, 1 Peere Williams 300.
Consequa v. Fanning, 3 Johnson's Chancery 587 (595).

IV.

The appellees have a right to have the entire decree considered, although only a part of it was complained of by appellants. Every appeal is a trial *de novo*.

2 Daniell's Chancery, page 1489.
Rawlins v. Powell, 1 Peere Williams 300.
Walter v. Symes, 1 DeG., M. & G. 240.
Sherwin v. Shakespear, 5 DeG., M. & G. 523.
Teaff v. Hewitt, 1 O. St. 511.
Consequa v. Fanning, 3 Johnson's Chancery 587.
Terhune v. Colton, 12 N. J. Equity 312 (see 318).

V.

As a question of fact, appellees contend that there is surplus flood water, and that the record should be completed in this court by ordering up the testimony and exhibits, and the decree of the court below should be reversed so as to permit appellee to go on with its work and make demonstration that there is surplus flood water.

ARGUMENT

We first desire to make a verbal analysis of the opinion, page 29 of the transcript. The court there says: "But it is not shown that there is any surplus water. Indeed, the evidence in this case tends strongly to support the complainant's position that all the water is necessary for the irrigation of the land in private holdings and which is annually irrigated by the overflow if undisturbed." We think the meaning of the court is that the evidence strongly *tends* to support, not that it "tends strongly to support," because the rest of the opinion and the decree as entered show that the court believes under appropriate proceed-

ings there may be shown some day that there is surplus water. The evidence before him, therefore, must have left him in doubt as to what would be the result of a more complete examination. The court says that the evidence tends to show that all the water is necessary for the irrigation of land "*in private holdings.*" He does not say "the lands of the complainant," and yet strictly that was the only right which he could consider. This was a suit between private parties, and between no other parties whatever other than the two corporations, complainant and respondent (for it is shown that the Silvies River Irrigation Company is successor to the Harney Valley Improvement Company). The evidence, however, took a wider range, and some settlers were introduced by the complainant, not to support complainant's right to the water, but to show their own right to and need of the flood waters. This testimony was taken over objection. It is perfectly apparent that it called to the attention of the court the fact that there were many claimants along this river, and that the court conceived it ought not to permit the respondent to go on with its canal and take out the surplus water, because of the great tangle of lawsuits and controversies which might grow out of such act. But, as the court could not decide the rights of parties not before him, and as whatever he might decide seemed certain to result in serious complications in the further adjustment of water rights in Harney Valley, the court adopted the plan of granting present relief to complainant by enjoining respondents, quite as much in the interest of the numerous settlers not before the court as in that of the single complainant; but the court, as chancellor, reserved to him-

self the right, and gave to respondents the right to open up the decree, if upon a larger and more complete examination of the whole river by a competent body, with all claimants and parties before it, it should then be judicially determined that there was actually a surplus of water in the flood season. This reservation of further right to consider is so common generally and so clearly equitable in this case, and so clearly within the discretion of the court, that we are inclined to treat the legal side of it as elementary, and to pass it without discussion.

Suppose the Water Board of Oregon, upon accurate measurement, and by requiring people to be economical and scientific in the use of the water, finds that in the spring season everybody can be given his full irrigation right, and still there remains a surplus of flood water. Would it not be a shame that the Water Board of Oregon should find its hands tied, and this respondent should find its hand tied, from carrying out a great public work of reclaiming the desert and making homes for the people merely to give, upon evidence not fully satisfactory to the court, the absolute control of Silvies River to this cattle company? It will be perfectly evident to this court, from a study of the opinion of the court below, that that court is animated in rendering its decree far more by a view of the general situation and the numerous settlers in Harney Valley than by any convincing idea as to the rights of the complainant. Cases may be found where the right to reopen the decree reserved at the foot thereof has been interpreted as not a right open to everybody, as, for example, a subsequent intervenor; also the original purpose of reserving the right of further proceedings has been

determined, and the actual opening up of the decree has been limited by that purpose. But in this case the court has made it perfectly clear that the right is reserved to the respondents; and that the condition is that if larger proceedings of a more public and general nature shall in the future show that there is surplus water, then the court reserves to itself the right to do equity, and will not by a final and unqualified decree be led into doing inequity. The reservation of power is really quite as much for the court in this case as for the respondent; and we think the decree would be so interpreted in the future should occasion arise.

It is just as true of the federal courts of equity today as it ever was of the English courts of chancery, that the powers of the court are large, flexible and sufficient for the court to meet the particular circumstances of the case and do equity. It is upon this great general principle of equity jurisprudence that the right to consider further rests. Daniell says, page 996 (fourth edition): "Although the general rule of the court is to make a complete decree upon all the points connected with the case, it frequently happens that the parties are so circumstanced that a decision upon all the points connected, with their interests, cannot be pronounced until a future period. * * * * *" The court then instances a case when the interests in a fund may alter at a future time and continues, "the same sort of liberty is also given in any other case in which it may seem requisite and the effect of it is not to alter the final nature of the decree. A decree with such a liberty reserved is still a final decree, and when signed and enrolled may be pleaded in bar."

Street on Equity Pleading and Practice quotes this language with approval, Section 1966.

> A case in equity cannot be appealed piecemeal.
>
> (2nd Daniell's Chancery Pleading and Practice, 4th Edition, page 1467.)

The appellant may appeal from a portion of the decree which is distinctly separable and stands alone from the rest of the decree, but if he elects to do so he is bound by it, and can have no other appeal. His right of appeal is exhausted. (Id.)

Also, by appealing from a part of a decree only the appellant admits the remainder to be correct, and is estopped to question it. (Id.)

Upon any rehearing or appeal in equity the whole case is open as upon a trial *de novo*.

(Daniell's Chancery, 4th Edition, page 1488.)

So that if the appeal be against the whole decree, it is competent for the court to make a decree more favorable to the respondent. (Id.)

Where the appeal is against a part of a decree only, the respondent may go into the whole case, whilst the appellant can only go into the parts complained of in his petition. (Id., page 1489.)

These elementary principles are all adopted by Street, practically verbatim, and we shall assume that they are unquestioned and unquestionable. The principles are very clear. We begin with the settled conclusion that an appeal in equity is a trial *de novo*. This being so, the Appellate Court has the entire case before it for consideration, and cannot be deprived of this jurisdictional right. Being a

court of chancery, equally with the court below, it is its business to administer equity as it sees it, precisely as if the case had never been tried before, and this being true, it necessarily follows that the respondent has the right to ask the court for the same relief and the same decree which he sought in the court below. The reason that the appellant is more limited in his right is because by appealing from only a portion of the decree he has by his own voluntary act confessed himself satisfied with the rest, and is estopped to contest it in the new trial in the Appellate Court just as if he had admitted upon record in the court below the same conclusions. Naturally, there are not very many cases illustrating these elementary questions of practice which have really never been questioned, but the following shed some light on the subject:

Parker v. Morrell, 2nd Phillips 453, citation page 461.

Teaff v. Hewitt, 1 O. St. 511, cit. page 519.

Terhune v. Colton, 1 Beasley, (N. J.) 312, cit. page 318.

Sherwin v. Shakespear, 5 DeGex M. & G. 517, citation page 523).

Consequa v. Fanning, 3 Johnson's Chancery 587, citation page 595.

Rawlins v. Powell, 1 Peere Williams 300.

Watts v. Symes, 1 DeGex M. & G. 240.

If this case is before the court at all, it is before it as a trial *de novo,* and nothing can rob the respondent of his right to go into the whole case for a reversal or modification of the decree on points other than those appealed from by the appellant. In this particular case the wisdom of the rule and the absolute inequity of a contrary rule are

made apparent by a slight consideration of the circumstances. The appellees, though not satisfied with the decree of the court below, and though believing that the general interests of the public have been sacrificed in stopping the work of the appellees, yet felt so sure of final triumph whenever the waters of Silvies River in the spring floods should be accurately determined and the use of the waters of Silvies River adjusted between all claimants that they refrained from taking any appeal themselves, expecting to join with the Water Board in a movement in contemplation to adjust all these water rights in Harney Valley. If it should transpire upon such a thorough examination that there is no surplus flood water, then the work already performed by the appellees must go for naught, and the decree entered in the court below must stand. But if it should be judicially determined as respondents confidently believe it will, and as appellants evidently fear it will, that there is enough water going to waste every year to reclaim at the least two hundred thousands acres of land, then these respondents would expect to make that showing upon a petition to reopen the decree, and relying upon that have not appealed. Every principle of equity and of public policy requires that appellees be premitted to do this, and that this decree be not suffered to arise in the future as a bar to the progress of this important portion of this state. But if we assume that this court finds it possible to assume appellate jurisdiction of this use by the chancellor of his discretionary power (well within his judicial discretion), and if we go further and assume it possible that this court then vacates this entry at the foot of the decree, and if we go still further and assume that this court refuses to order

up the testimony and exhibits in the case, then the appellees have really become entrapped by the act of the court below and of this court, for they have suffered a decree to become permanent against them without appeal and without any consideration of the testimony taken, which they certainly would have appealed from upon a complete record of the evidence but for the saving clause at the foot of the decree. And how can anyone be hurt by the leave granted at the foot of the decree? If at any time it should be demonstrated that there is surplus flood water, then certainly equity requires that that surplus water be put where it will do the most good. If there be *surplus* water, then nothing belonging to appellant is taken away from it and it is in no way injured. If there be no surplus water the decree will stand forever, and likewise it will be in no way injured. There is no aspect under which the right to further consider can be held to be an injury to the appellant.

UPON THE EVIDENCE AVAILABLE IN CASE No. 2036 ONLY, AND UNDER PROTEST AGAINST CONSIDERING THE CASE AT BAR UPON SO INCOMPLETE A RECORD, WE PROCEED TO DISCUSS THE EVIDENCE IN PACIFIC LIVE STOCK CO. v. WM. HANLEY *et al.* (No. 2036), STIPULATED AS APPLICABLE TO THIS CASE ALSO.

THE EVIDENCE SHOWS THAT THERE IS SURPLUS FLOOD WATER, AND THE COURT BELOW ERRED IN MAKING THE INJUNCTION PERMANENT.

If we have the power to set aside the judicial discretion of the court below and give this court jurisdiction to hear the whole case, and if this court is willing, with our consent, to hold that this is an appealable portion of a decree, we are, as stated, perfectly willing that this court should take jurisdiction of the case for a trial *de novo,* provided the court will upon our motion for a completion of the record order before it the testimony taken and exhibits filed in this cause at bar. An examination of the testimony in the Hanley case (2036), in which testimony on the part of appellees was purposely made very incidental to the issues in the case at bar, cannot fail to convince the court that in the testimony taken in the case at bar upon the direct issue of surplus water *vel non,* there will be found much to show that in the spring there is a great quantity of surplus flood water in the Silvies River and to suggest what may be found in the 601 pages of testimony not before the court, we examine here the testimony in the Hanley case which is before the court—but only suggestively, not completely, for we cannot bring ourselves to believe that this court will take jurisdiction of this appeal; still less can we believe that if taking jurisdiction he will refuse to have the whole record before it. It is upon these beliefs that the following is offered.

The case around which the thickest smoke of battle lingered was the Hanley case, No. 2036, which does not relate to surplus waters at all, but is merely a supplemental proceeding interpreting an old decree fixing Hanley's right to the use of the waters of Silvies River for his own particular ranch. In this case it was claimed that he had dug new ditches, altered old ones, altered dams, built

dykes and other obstructions not consistent with the original decree, etc. Most of these allegations were tried out on contempt proceedings and Hanley was discharged. Afterward the supplementary bill now in question (case No. 2036) was filed against Hanley on the ground of interpreting the original decree, but in reality trying out in a new form the old contempt proceedings. The issues in this case were so much more vivid and the feeling on both sides so much more evident that on our part the examination of the witnesses in that case was put to the front, and kept to the front, upon the issues involved in that case alone. Nevertheless, if it be sought for, we think evidence lies in the record in case No. 2036 overwhelmingly showing that there is a great surplus of water from the middle of February to the middle of May, as extreme limits, with the heaviest flood usually during the month of April. The appellant's own witness, Charles Cronin, shows that high water comes ordinarily during April and the flood stage lasts for a month or six weeks (pages 117-118); and the same witness shows that the grass raised is a wild water-grass on wild water meadows, and that the lands are inundated naturally, just about as they have always been, to raise this wild grass (page 119). Also, that the lands in question are largely tule swamp (pages 127 *et seq.*). Another of appellant's witnesses, Bart Cronin, shows that the season of heavy flood is March and April; that it lasts a month or six weeks (pages 167-168). John Gilcrest, the general superintendent for the appellant, testifies that the time of flood varies with the melting of the snows, and comes sometimes in February, but rarely, and the general break-up comes usually in April (page 247).

On page 292 it is shown by an interrogation by Mr. Treadwell that the title to certain of appellant's lands comes through the State of Oregon under the Swamp Land Act, as swamp land, and Mr. Gilcrest admits that certain large fields are half of them covered with tule, or a fourth of them are tule, and in making a guess as to the whole amount says ten sections of the company's lands are covered with flag and tule. That would be six thousand four hundred acres of tule swamp, and if that doesn't indicate surplus water somewhere it will be difficult to produce any testimony that does. In one field, called the "Red S" field, Mr. Gilcrest admits in the neighborhood of four sections of tule and flag (pages 293-294-395). A fair inference from Mr. Gilcrest's testimony, on page 437, is that in the spring of the year in which he was testifying there was more water than they could properly handle for a short time; and on pages 320 and 321 he shows that this crop that they harvest for hay is a water-grass, indicating low ground and overflooded lands. J. H. Hill, also a witness for the appellant, testified that there is no stated season, but they watch the snow going off the mountain. Ordinarily the floods begin early in April and last till the middle of May (page 349), and that there is usually a big flood, which doesn't last as long as the ordinary flood, and that ordinary flood water covers his land, sometimes an inch, sometimes a foot (pages 349-350). It must be apparent to the court that a foot of water is not needed for the successful wetting of land. An inch of water flowing over it is as good as a foot, provided it flows long enough; and that extra water which inundates Harney Valley on the

crest of the big flood is the very water the respondent is after.

Frank Whiting, a witness for the respondent, says that sometimes the water would be out of the river belly-deep, or mid-sides deep, for a mile across the valley (page 618). E. L. St. Clair, a witness for the respondent, shows that the flood water extends out into the country for several miles. The appellants contend that any excess of water, no matter how deep, doesn't injure the crop (page 217), whereas one of their main contentions in the other suit (2036) is that Hanley insists on drain ditches and dykes to keep the surplus flood water from getting too deep and cold on his land; and George Craddock shows this injury to the crop and the excess of flood water (pages 536 and 537). Gilcrest himself testifies that Hanley's drain ditch is full at the flood time, carrying off the excess water to its full capacity (pages 325-326). W. D. Hanley, one of the principal men back of the appellees' irrigation enterprise, testifies that the flood season varies, and he would say the big general flood comes from the 15th of March to the 15th of April; that in a cycle of ten years there would be five high floods, three light floods and two very low floods (pages 733-4), but that every year the water goes east of his line into the edge of the black sagebrush (page 735). Mr. Hanley has been in the country since the time it was Indian country, June, 1879; started the first irrigation that was ever done in the country, and the first farming without irrigation, and was the first to raise cereals. Making every allowance for interest, his entire testimony will show that he is the best equipped witness on facts who took the stand (pages 707-723). On page

725 he shows that during flood time every slough is running bigger than the river itself, draining water into the swamps and lakes which ought to be led out onto the desert. On page 738 he shows the difficutly in handling the surplus water, and pages 741 and 742 shows the beginning of the enterprise for reclaiming these sagebrush desert lands, and that there was a great deal of surplus water coming out of Foley Slough which no one was putting to any use (page 741). On page 766 he also shows the injury from too much water. On page 809 he shows that Foley Slough carries three or four times as much as the river itself in high flood years, and continuing, pages 810, 812, 814, 816, he goes on to show that all this water finally gets into Malheur and Harney Lakes; he shows that the Blitzen River runs through the very property of which he is manager, that he is very familiar with it, and that Silvies River in low water years furnishes about half the waters of the lakes, but in high water years furnishes a big two-thirds; and commencing with page 816 he goes on to show that the plan of the respondent is to divert this useless and surplus water which makes these swamps and lakes and carry it out onto desert country that at the present time is worthless by reason of lack of water. On page 817 he says, "I mean by surplus water that water which is unused or unappropriated by anyone else, and the water that goes into Malheur and Harney Lakes; truly waste water." He also says that in addition to these lakes a big part of the country is marshes, swamps, tule, flag and sugar-grass, all of which mean, really, a swampy condition, produced by too much water. And on pages 817 and 818 he says he has no intention of trying to touch anyone's

present right of irrigation, but simply wants to use the waste water that does much harm by raising waste products in the form of tules, flags and water-grasses and in forming lakes; and on page 818 says, "In my judgment there is enough water to practically reclaim the valley if it was put under the management and development of an economcial system." Continuing, page 818, *et seq., he* shows his actual experiments and experience with this flood water irrigation, producing from ten to twenty bushels of grain per acre, and that it will get better as time goes on. And commencing with page 821 he describes the width of the irrigation canal and the plan of projected work. Mr. Hanley's whole examination, especially the cross-examination, is well worthy the attention of the court.

We do not believe it is within the right of the appellant to have the flood waters come to its land as they have always come, making a natural hay crop on natural hay land, with a great excess of water which goes to waste in forming these lakes and marshes, but we believe both strict private right and large public policy require that the appellant use the water economically and scientifically, and that it has a right to no more water than it is entitled thus judicially to use. We point to the overwhelming facts of the existence of these lakes, the existence of over six thousand acres of swamp, on the appellant's own land, which are admitted to be several miles from the lake, as proof conclusive that at some time of the year surplus water is going to waste. Or, put it another way: One of the government's original reclamation plans, not carried out for lack of funds, was to store the very waters that make these lakes and swamps,

and allow only enough to come down to supply the needs of cultivators. Will this cattle company, in such an event, be permitted to block this great storage enterprise merely that it, as the lowest owner, may remain master of the river and require all water to come to its acres and let it go to waste in vast areas of swamp land which, though they suit the private purposes of this cattle company well enough are, so far as human progress is concerned, a double waste—a waste of the swamp land itself and a waste of the water which makes it. We earnestly ask this court, if it takes jurisdiction of this appeal, to dissolve the injunction entered against us and permit us to at least make the experiment, to see if we can reclaim one hundred and fifty thousand acres of desert land, as Mr. Hanley thinks we can. Real conservatism ought to allow us to at least make the experiment. Then, if it turns out that we are mistaken, and there is no surplus water, we are the only ones injured; and it seems to us that the present decree, which blocks an enterprise even before its results have been tested by experinc, is inequitable, and certainly not warranted by the great physical facts which are in evidence and which no one can dispute.

We call attention to the fact that of all the testimony adduced by the complainant the only witnesses who were ranchers and who testified to water conditions are Barnes, Bunyard, Hill, Creasman and F. L. Mace; and not one of these testifies to the question of surplus water, unless perhaps Mr. Hill's testimony might be interpreted as touching upon that issue. They are really testifying about the Hanley situation. All the rest of complainant's witnesses are its employes—Bodle, Clark, Bart Cronin,

Charles Cronin, Gilcrest, Holland, Love and the civil engineers, Johnson, Foster, Faulkner. The independent ranchers who testified for the respondents are Brown, Cox, Denstedt, Fry, Hopkins, Houser, James Lampshire, Stephen Lampshire, H. B. Mace, McPheeters, Pirie, Smith, St. Clair, Varien, Wallace, Whiting and Wood. Levens is one of the parties respondent in the Hanley case and Craddock was formerly employed by Hanley. An examination of the testimony of these men will show that in reality the appellant stands alone in that country in its effort to block this reclamation enterprise. As already stated, if there is anything we can do by consent to enable the court to take cognizance of this case as an entirety upon a complete record we are glad to do it, as we are very dissatisfied with the decree as it stands. It ties our hands completely until proceedings of a necessarily slow and tedious nature are completed, and we believe the welfare of Harney Valley requires that this surplus water be put to use instead of making swamps. But we regret to say that it is not, in our opinion, an appealable part of the decree, and therefore we feel obliged to renew the following motion:

THE APPELLEE MOVES TO DISMISS THE APPEAL FOR THE REASON THAT THE PART OF THE DECREE APPEALED FROM IS DISCRETIONARY WITH THE COURT BELOW AND IS NOT APPEALABLE; AND THIS COURT CANNOT PROPERLY UNDER THE RULES OF EQUITY JURISPRUDENCE TAKE JURISDICTION. AND ALSO MOVES AGAINST A DIMINUTION OF THE RECORD

AND FOR ITS COMPLETION BY REQUIRING THE CLERK OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON TO TRANSMIT TO THIS COURT A FULL AND COMPLETE TRANSCRIPT OF ALL THE TESTIMONY TAKEN IN THIS CAUSE AND FILED IN HIS COURT, TOGETHER WITH ALL EXHIBITS FILED AS A PART OF THE RECORD IN THIS CAUSE, AND ALSO THE STIPULATIONS OF THE PARTIES AND THE REPORT OF THE MASTER IN CHANCERY, WALLACE McCAMANT, UPON EXCEPTIONS TO THE BILL.

A party cannot appeal where the determination complained of is merely the result of the exercise of judicial discretion on a matter fairly subject to the exercise of discretion.

2 Daniell's Chancery, 1462, 1463 (4th Ed.).

Application to reopen a cause is addressed to the discretion of the court, and an appeal does not lie from an order either granting or denying such application.

Street, Federal Equity Practice, Section 2083.

No apepal lies from a matter which rests with the sound discretion of the court below, as refusal to open a former decree.

Terry v. Commercial Bank, 92 U. S. 454.
Brockett v. Brockett, 2 How. 238, 240.
MacMicken v. Perin, 18 How. (59 U. S.) 507, 511.
Wyle v. Coxe, 14 How. 1.
Steines v. Franklin Co., 14 Wall. 1522.

Most of these cases relate to an appeal from a court's refusal to open a decree when within its power to do so. Naturally, the opening of the decree would stand upon the same footing. An appeal does not lie from an order of the chancellor refusing to vacate an order that a bill be taken *pro confesso.*

Rowley v. Van Benthuysen, 16 Wend. 369.

Exceptions to a master's report addressed to the discretion of the chancellor cannot be reviewed on appeal.

Merriam v. Barton, 14 Vt. 501-514.

The ordering of an issue to be submitted to a jury in a suit in equity is an exercise of judicial discretion and not appealable.

Ward v. Hill, 4 Gray, (7th Mass.) 593.
Crittenden v. Field, 8 Gray (74 Mass.) 621-626.

But why multiply citations to this court upon so well settled a proposition?

Respectfully submitted,

C. E. S. WOOD,
LIONEL WEBSTER,
Of Counsel for Appellees.

WILLIAMS, WOOD & LINTHICUM,
LIONEL WEBSTER,
Solicitors for the Appellees.

APPENDIX

The Following Motions and Certificates are Filed in this Court and Cause:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Pacific Live Stock Company (a corporation),
Appellant,

v.

The Silvies River Irrigation Company (a corporation) and Harney Valley Improvement Company (a corporation),
Appellees.

Now come the appellees, by C. E. S. Wood and Lionel Webster, their solicitors, and move the court that the appeal be dismissed for lack of jurisdiction, for the reason that the portion of the decree appealed from lay within the judicial discretion of the trial court.

And appellees also move against a diminution of the record, and show to the court that the testimony and exhibits in this cause are not before the court so that the court can proceed as upon a trial *de novo*, and refer to the certificate of the Clerk of the Circuit Court of the United States for the District of Oregon, filed herewith.

C. E. S. Wood,
Lionel Webster,
Solicitors.

United States of America, }
District of Oregon. } ss.

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify that there is on file in the records of said court in my custody, in cause No. 3276, Pacific Live Stock Company, plaintiff, v. Silvies River Irrigation Company, defendant, one volume of testimony consisting of 601 pages, to which is attached a certificate of the special examiner appointed

to take the testimony in said cause that said volume contains a full, true and impartial record of the shorthand notes of the testimony, objections, stipulations and introduction of exhibits in said cause; and I further certify that there is also on file in said cause in said court all the exhibits introduced in evidence in the taking of said testimony.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 6th day of November, 1911.

(Seal.) G. H. Marsh, Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Pacific Live Stock Company, a corporation,
Complainant,

v.

Silvies River Irrigation Company, a corporation, and Harney Valley Improvement Company,
a corporation,
Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the testimony to be taken by the special examiner pursuant to an order of this court duly made and entered in a certain cause wherein Pacific Live Stock Company is complainant and W. D. Hanley *et al.* are defendants, may be used in this cause by either party.

Dated this 29th day of June, 1910.

Teal & Minor,
Solicitors for Complainant.
Lionel R. Webster,
C. E. S. Wood, of
Solicitors for Defendants.

Stipulation filed June 29, 1910.

G. H. Marsh,
Clerk U. S. Circuit Court, District of Oregon.

United States of America,
District of Oregon. } ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of stipulation in cause No. 3276, Pacific Live Stock Co. v. Silvies River Irrigation Co., has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this November 6, A. D. 1911.

(Seal.) G. H. Marsh, Clerk.